STATUS OF A CONTROVERSY: THE TAX COURT, THE COURTS OF APPEALS, AND JUDICIAL REVIEW

I. INTRODUCTION

One of the most fundamental principles guiding the workings of the judicial system in the United States is the assumption that a court in its adjudications will follow a clearly applicable precedent established by its reviewing court. Yet for many years one court, the United States Tax Court, refused to be bound by that basic concept. The Tax Court took the view that Congress, by giving the court nationwide jurisdiction, intended it to decide all cases uniformly, regardless of where they may arise.[1] Because the eleven courts of appeals review decisions of the Tax Court,[2] the Tax Court believed that it could not fulfill its congressional mandate if it were to decide one case one way and another differently merely because appeals in such cases might be taken to different courts of appeals.[3]

As a result, the Tax Court resolved to decide all cases on its own determination of the law and the merits of the case,[4] even if in so doing the court found it necessary to disregard a holding, squarely in point, by the court of appeals which was likely to review the case. The approach spelled out in *Lawrence* persisted as part of the Tax Court's repertoire for many years. However, in *Jack E. Golsen*,[5] decided April 9, 1970, the Tax Court took a significant step toward abandoning the controversial *Lawrence* doctrine.

From the outset, it was clear that the facts of the *Golsen* case would not place a constraint upon the Tax Court to re-evaluate the *Lawrence* doctrine. The taxpayer in *Golsen* had purchased life insurance policies with exceptionally high premiums and high cash values. The taxpayer then borrowed the full cash value of the policies each year.[6] Most of the funds were added to a prepaid premium fund, maintained by the insurance company, from which petitioner's annual premium on the policies was paid. The remaining funds were used to pay the interest on petitioner's indebt-

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[1] Arthur L. Lawrence, 27 T.C. 713,718 (1957). *Lawrence* was the principal case in which the Tax Court articulated its policy of deciding cases uniformly.

[2] Under INT. REV. CODE of 1954, § 7482(a) the courts of appeals have exclusive jurisdiction to review decisions of the Tax Court. Venue is determined by the legal residence of the petitioner, if he is an individual, or in the case of a corporation, by the location of its principal place of business. INT. REV. CODE of 1954, § 7482(b)(1). In addition the parties may, by stipulation, appeal to any one of the courts of appeals. INT. REV. CODE of 1954, § 7482(b)(2). If two or more litigants are joined in a single case before the Tax Court, each litigant is free to direct an appeal to the court of appeals in whose jurisdiction he resides.

[3] Arthur L. Lawrence, 27 T.C. 713, 718 (1957).

[4] *Id.* at 716-17.

[5] 54 T.C. 742 (1970).

[6] *Id.* at 752.

edness, created by his borrowing of the full cash value of the policies.[7] Taxpayer sought to claim a deduction for income tax purposes of interest on indebtedness.[8] The Tax Court denied the deduction, holding that such policies were "merely the equivalent of renewable term insurance, and that actuarially the net cash which the insured in fact paid to the insurance company, however described, merely represented the true cost of the insurance purchased."[9]

This very issue had already been adjudicated by two courts of appeals with differing results.[10] Appeal in *Golsen* lay to the court of appeals which had accepted the view that the Tax Court was taking in *Golsen*. The Tax Court did not have to consider the applicability of the *Lawrence* doctrine, because the two courts were in harmony. Nonetheless, the Tax Court chose *Golsen* as its vehicle for discarding the more controversial aspects of that doctrine. The *Golsen* court said that whether or not the Tax Court was in agreement with the reviewing court, it was bound by that court of appeals prior holding on the issue.[11] The Tax Court acknowledged the contrary thrust of *Lawrence*, but said that "[b]etter judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone."[12]

II. THE LAWRENCE DOCTRINE

When *Lawrence* was decided in 1957 it was the formalization of past practice, rather than a departure from it.[13] Since its founding as the Board of Tax Appeals in 1924, the Tax Court has wrestled with the difficulties of administering what it believed to be a congressional mandate to use its nationwide jurisdiction to foster uniform application of the federal tax laws.[14] One of the more vexing problems in this context has been the handling of an issue which comes before the Tax Court after a court of appeals has reversed a prior Tax Court holding on the same point. In *Lawrence* the Tax Court said that it would consider the higher court's reasoning. But if still convinced of the merits of its original result, the Tax

[7] *Id.* at 745.

[8] INT. REV. CODE of 1954, § 163.

[9] Jack E. Golsen, 54 T.C. 742, 753 (1970).

[10] In *Campbell v. Cen-Tex, Inc.*, 377 F.2d 688 (5th Cir. 1967) the taxpayer won, but in *Goldman v. United States*, 403 F.2d 776 (10th Cir. 1968) the government had prevailed.

[11] Jack E. Golsen, 54 T.C. 742, 756 (1970).

[12] *Id.* at 757.

[13] *See* Brooklyn Nat'l Corp., 5 T.C. 892, 895 (1945) and Joan Carol Corp., 13 T.C. 83, 85 (1949). In both these pre-*Lawrence* cases the Tax Court declined to follow an applicable precedent of the reviewing court of appeals.

[14] Arthur L. Lawrence, 27 T.C. 713, 718 (1957). Besides the grant of nationwide jurisdiction, the fact that the Tax Court was long designated an agency of the executive branch and not a constitutional court undoubtedly contributed to its sometimes reluctance to act like a court. INT. REV. CODE of 1954, § 7441.

Court would follow its initial holding until the Supreme Court decides the point.[15]

The courts of appeals made clear their dislike for the *Lawrence* approach in two particular cases, one decided shortly before and the other immediately after *Lawrence*.[16] In *Stacey Manufacturing v. Commissioner*,[17] the sixth circuit gave its "considered opinion" that the Tax Court is not lawfully privileged to refuse to follow, as the settled law of the circuit, an opinion by the court of appeals of that circuit.[18] The seventh circuit was equally harsh in stating that the Tax Court's overruling of a decision of the court of appeals "is not consonant with the responsibilities of the respective tribunals involved."[19] The latter case was heard by the Supreme Court[20] which affirmed the decision of the court of appeals without reference to the conflict between its subordinate courts.

Editorial reaction to *Lawrence* was generally critical.[21] There was considerable questioning of the efficacy of the Tax Court's view of its policy making role in the tax adjudication process. The court's primary function was thought by the editorial writers to be the settlement of specific disputes, not the setting of broad policy.[22] The futility of the court's effort to secure uniformity was already evident from the fact that the Tax Court heard only disputed determinations of a deficieny in the payment of taxes, while jurisdiction over the refund of taxes already paid was vested in the federal district courts and the court of claims.[23]

The critics also generally rejected the Tax Court's technical justifications for the *Lawrence* approach. The principal problem, as the Tax Court apparently saw it in *Lawrence*, was the question of venue. The court said it couldn't be sure when it decides a case where any subsequent appeal will go. The court usually knows where the return was filed and hence where the appeal could go,[24] but the parties by stipulation may appeal to any of the courts of appeals.[25] Moreover, it frequently happens that a Tax Court decision is appealable to more than one court of appeals,

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15 *Id.* at 716-17.

16 *Lawrence* was decided January 25, 1957. *Lawrence* was reversed on the merits of the case by the ninth circuit which made no mention of the doctrine for which *Lawrence* became best known. 258 F.2d 562 (9th Cir. 1958).

17 237 F.2d 605 (6th Cir. 1956).

18 *Id.* at 606.

19 Sullivan v. Comm'r, 241 F.2d 46, 47 (7th Cir. 1957).

20 356 U.S. 27 (1958).

21 Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717 (1957). Orkin, *Finality of the Court of Appeals Decisions in the Tax Court: A Dichotomy of Opinion*, 43 A.B.A.J. 945 (1957). 70 HARV. L. REV. 1313 (1957). 7 DUKE L. J. 45 (1957).

22 Comment, *Heresy in the Hierarchy*, *supra* n. 21, at 721.

23 *Id.* at 722. Orkin, *supra* n. 21, at 946.

24 Arthur L. Lawrence, 27 T.C. 713, 718 (1957).

25 INT. REV. CODE of 1954, § 7482(b)(2).

because multiple parties are involved. In *Lawrence* the court uses the example of an action involving corporate stockholders who are scattered throughout the United States.[26] It also offered the examples of partners who live in different circuits and of the taxpayer who has filed returns for different years in different circuits.[27]

The court's concern regarding the possibility of a change of venue by stipulation was unwarranted, because it appears certain that both parties will not agree to take an appeal outside a circuit in which the court of appeals has already made clear its support of the position of one of them.

The problem raised when the case is appealable to two or more circuits is immensely more difficult. It has been argued that even if the problem was decisive in those cases where it does exist, it should not be used to justify, as a general proposition, rejection of applicable appellate court precedents.[28] Beyond that, however, it has been contended that the Tax Court can solve the problem merely by acknowledging that it need not apply the same law to all litigants before it.[29] To follow blindly this approach, however, could put the Tax Court in an uncomfortable position. In the case of a corporate distribution, for example, the court might have to direct some shareholders to pay tax on the distribution, while relieving others of any liability to pay tax on the same transaction, solely because they reside in different circuits. It can be done, but to do so would put the judges of the Tax Court in the position of having accepted both sides of an issue in order to further the mechanical application of normal judicial procedure. Other federal courts and state courts can apply precedent to all litigants before them without being placed in a similar situation.[30] Besides its effect on the judges of the Tax Court, such an approach is likely to lessen respect for the Tax Court by a taxpayer who loses his case in such circumstances.

The *Lawrence* approach was also criticized because it brought the financial position of the taxpayer into play.[31] If one could afford to pay the deficiency, he could then seek a refund in the district court which was certain to follow the rule in its circuit. On the other hand, one who took the same case to the Tax Court could be forced, by the court's refusal to follow applicable precedent, to pursue a costly and time-consuming appeal to reach the same ultimate result.

The impact of the *Lawrence* doctrine on the Tax Court's disposition of

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[26] Arthur L. Lawrence, 27 T.C. 713, 718-19 (1957).

[27] *Id.* at 719.

[28] Comment, *Heresy in the Hierarchy*, *supra* n. 21, at 721.

[29] *Id.*

[30] These courts fall into the traditional pyramidal system of review and need only look to a single higher court for precedent. The system for review of Tax Court decisions constitutes an inverted pyramid; the Tax Court must look to all eleven courts of appeal for applicable precedent.

[31] Comment, *Heresy in the Hierarchy*, *supra* n. 21, at 722. 7 DUKE L. J. 45, 49 (1957).

post-*Lawrence* cases is difficult to determine. In the 1950's the court expressly declined to follow a court of appeals precedent in several cases and in so doing cited *Lawrence*.[32] In the 1960's the doctrine was rarely invoked by name. Whether it was applied subtly, by distinguishing cases, for example, is hard to ascertain. In *Golsen* the court stated that during the thirteen years since *Lawrence* was decided the Tax Court had never deemed it appropriate to re-evaluate the *Lawrence* doctrine.[33] Actually, a minority of the Tax Court did consider the issue in 1968. Five judges in a concurring opinion[34] voiced their disagreement with the majority view but said that to hold otherwise would be impractical inasmuch as the court of appeals which was likely to review the case had held as the majority now holds. In this way, they expressly stated their unwillingness to follow *Lawrence*.

The foregoing discussion suggests a fairly vigorous application of the *Lawrence* doctrine in the late 1950's, subtle application or disinterest in the early and mid-1960's, growing hostility toward it in the late 1960's, culminating in partial abandonment of the doctrine in 1970.

III. IMMEDIATE CONSEQUENCES

Golsen has clearly limited the use of a policy under which the Tax Court has openly defied the authority of its reviewing courts. Consequently, the *Lawrence* doctrine will no longer be used to support a refusal to apply precedent, when an appeal from the Tax Court can go to only one court of appeals and that court has established a clearly applicable precedent. The language of *Golsen* suggests, however, that the court may not intend to abandon the doctrine completely; at least the court did not expressly state such an intent.

In *Golsen* the court stated that it would follow a court of appeals precedent which is "squarely in point," where appeal from the court's decision is directed to that court of appeals and "to that court alone."[35] The phrase "squarely in point"[36] might mean that the Tax Court will decline to follow a court of appeals precedent if the cases involved are distinguishable, even slightly, on their facts, or if the Tax Court is unsure about the exact rule of law that has been laid down by the reviewing court. The phrase "and that court alone"[37] could indicate that the Tax Court will adhere to precedent only when dealing with a single litigant or with multiple

[32] Mary Stoumen, 27 T.C. 1014, 1021 (1957). Estate of Loeb, 29 T.C. 22, 28 (1957). Charles M. Kilborn, 29 T.C. 102, 110 (1957). Estate of Baker, 30 T.C. 776, 779 (1958). Genevra Heman, 32 T.C. 479, 490 (1959).

[33] Jack E. Golsen, 54 T.C. 742, 757, n.14 (1970).

[34] Norvel Jeff McLellan, 51 T.C. 462, 467 (1968).

[35] Jack E. Golsen, 54 T.C. 742, 757 (1970).

[36] *Id.*

[37] *Id.*

litigants whose appeals are limited to the precedent-setting court of appeals. This limitation leaves open the question of the applicability of the *Lawrence* doctrine in cases involving multiple litigants, where appeal to two or more courts of appeals is possible. In such circumstances the Tax Court could separate the litigants and use precedent as it applies to each litigant. The court could, alternatively, apply the *Lawrence* doctrine and decide the case solely on the court's own determination of the law and the merits of the case.

The partnership situation highlights the dilemma involved in applying either approach. The partnership itself is not subject to the federal income tax. Instead the persons carrying on a business as partners are liable for the tax in their individual capacities.[38] The following setting is illustrative. Partners, residing in different circuits, claim on their individual tax returns a deduction which they allege is a business expense related to the activities of the partnership. The Internal Revenue Service disallows the deduction and assesses a deficiency. The partners acting in their individual capacities join in a petition before the Tax Court. The decision of the court relates to a single transaction involving a single entity, the partnership. The decision is appealable, however, to different courts of appeals, because of the residences of the partners. Here logic is scorned, if the court decides in favor of one partner because of an applicable precedent by the court of appeals which will review his case, but against another partner on the merits of the case in the absence of precedent. In so doing, however, the Tax Court removes the necessity of an appeal by the first partner to vindicate what are clearly his legal rights. If *Lawrence* was followed and the case was decided for both partners solely on the merits, the first partner would be forced to make a costly and time-consuming appeal to a court of appeals which has already accepted his position. *Golsen* does not make clear what the court's formal approach will be in such situations.

The Tax Court's opportunity for securing review by the Supreme Court is not hampered by the Tax Court's acceptance of applicable court of appeals precedent. Most tax cases reach the Supreme Court on a petition for certiorari. A review on certiorari is discretionary and will be granted "only where there are special and important reasons therefore."[39] A showing of conflict among the courts of appeals is likely to weigh heavily as a factor favoring review. The contention that a court of appeals decided wrongly is not in itself likely to be considered a "special and important" reason for review.[40] For this reason, the kind of head-to-head confrontation between the Tax Court and the reviewing court of appeals brought

[38] INT. REV. CODE of 1954, § 701.

[39] U.S. SUP. CT. R. 19.

[40] R. FIELD AND B. KAPLAN, CIVIL PROCEDURE (temp. 2d ed. 1968), at 112.

about by a strict application of the *Lawrence* doctrine does virtually nothing to promote vindication of the Tax Court's position by the Supreme Court.[41]

The court in *Golsen* pointed out that, even in the absence of the *Lawrence* doctrine, the Tax Court is able to foster uniformity in the application of the federal tax laws. The Tax Court can offer its views in cases appealable to courts whose views on a particular issue have not been made known. In the situation where the reviewing court of appeals has established a precedent, the Tax Court can explain why it agrees or disagrees with the precedent which it feels constrained to follow.[42]

IV. THE EFFECT OF STRUCTURAL CHANGES

The existence for many years of the *Lawrence* doctrine or its equivalent reflects more than the views of a majority of the court at a given time. The doctrine was a reaction, perhaps an inevitable one, to the unique position that the Tax Court long held in the executive and judicial machinery. Two factors were most crucial in this regard—the Tax Court's status as an independent agency of the executive branch[43] and the system for reviewing Tax Court decisions which has eleven courts reviewing one. The difficulties inherent in the court's position as an executive agency were remedied by the Tax Reform Act of 1969, which gave the Tax Court status as a constitutional court.[44] The more difficult problems raised by the inverted pyramid structure for review remain unsolved, however.

A. *Recognizing the Judicial Status of the Tax Court*

The *Lawrence* decision with its emphasis on uniform application of the federal tax laws gave support to the view that the Tax Court has at least some role in promoting the tax policies of the executive branch. *Golsen* by emphasizing proper judicial administration, stresses the Tax Court's status as a court. *Golsen* was decided less than a year after the Tax Court's status was changed by the Tax Reform Act of 1969. Thus, *Golsen* may well reflect the action of Congress, even though the court in *Golsen* makes no mention of this factor in its reasoning.

Attempts had been made previously to remove the Tax Court from the executive branch. However, each time they failed, although opposition

[41] The tax adjudication process already functions with a minimum of review by the Supreme Court. In 1969, for example, the Supreme Court decided only six civil tax cases. Two of these cases were heard initially by the Tax Court, three by district courts, and one by the Court of Claims. 1969 ANN. REP. OF THE COMM'R OF INT. REV. 121, table 21.

[42] Jack E. Golsen, 54 T.C. 742, 757 (1970).

[43] INT. REV. CODE of 1954, § 7441.

[44] Under § 951 of the 1969 Act, which amended § 7441 of the INT. REV. CODE of 1954, the United States Tax Court was established as a court of record. Pub. L. No. 91-172, tit. IX, subtit. D (Dec. 30, 1969). Inherent in that change was the granting of authority previously denied the Tax Court, such as the power to punish for contempt.

to such proposals was not always substantial.[45] In 1967 and 1968 a subcommittee of the Senate Judiciary Committee held hearings on the proposal that was ultimately adopted in the Tax Reform Act of 1969.[46] During those hearings, the status of the Tax Court as an executive agency was criticized on several grounds. It was said to violate the constitutional separation of powers.[47] The court's status meant that while the court's functions were essentially judicial, it lacked essential judicial powers.[48] In addition many taxpayers were thought to view the Tax Court as an arm of the Internal Revenue Service and to regard it as just the final step in the administrative settlement of tax disputes.[49] Most of those testifying agreed that granting the Tax Court status as a constitutional court would go a long way toward remedying these infirmities.

Opposition to the proposal was not substantial. The Department of Justice was concerned that such a change at that time would prevent more basic changes in the tax adjudication system.[50] The Department of the Treasury and the Internal Revenue Service were apprehensive about disruptions in their existing bureaucratic machinery.[51]

The *Lawrence* doctrine itself found its way into the hearings during the testimony of Sheldon Cohen, at that time the Commissioner of Internal

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[45] Opposition to one such proposal, offered to the House of Representatives in 1949, was apparently based mainly on the fear that accountants would no longer be allowed to practice before the Tax Court. Even at that time, however, lawyers constituted 98% of the practitioners before the court. Gribbon, *Should the Judicial Character of the Tax Court be Recognized*, 24 GEO. WASH. L. REV. 619, 622 (1956). A similar proposal was introduced in the Senate in 1958, but it too came to naught. Henke, *The Tax Court, the Proposed Administrative Court, and Judicialization*, 18 BAYLOR L. REV. 449, 465 n.62 (1966).

[46] *Hearings on S.2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st and 2d Sess. (1968). (hereinafter cited as *Hearings*).

[47] *Id.* at 15. This precise contention had already been the subject of litigation. In *Martin v. Comm'r*, 358 F.2d 63 (7th Cir. 1966), it was held that the creation of the Tax Court as an executive agency was not an unconstitutional attempt by Congress to infringe on the functions of the judicial branch. In *Nash Miami Motors v. Comm'r*, 358 F.2d 636 (5th Cir. 1966) the court ruled that the existence of the Tax Court did not constitute a violation of the separation of powers. The very fact that the issue was brought before the courts, however, served to underscore the uncertainty that existed about the status of the Tax Court.

[48] *Hearings*, *supra* n.46, at 15, 60.

[49] *Id.* at 15,61.

[50] *Id.* at 44. This testimony was offered during the first session of the subcommittee's hearings in October 1967. At the second session in July 1968 the Justice Department offered its suggestions for a basic change in the present system of trying federal tax cases. The department proposed that exclusive jurisdiction over civil tax cases be vested in one of the existing trial courts—the Tax Court, the federal district courts, or the Court of Claims. Alternatively, it was proposed that the three existing trial courts be given concurrent jurisdiction over claims for refund and deficiency claims. *Id.* at 120-25. Whatever the merits of these proposals, they offered no satisfactory reason for delaying recognition of the Tax Court's status as a constitutional court.

[51] *Id.* at 78-9. The Treasury Department was concerned that representation of the Government before the Tax Court would shift from the Internal Revenue Service to the Justice Department. Although this could have happened if normal procedure was followed, many exceptions already existed, and the bill in question provided for continued representation by the Internal Revenue Service. *Id.* at 79.

Revenue. He took a view similar to that of the court in *Lawrence*. Cohen stated,

> . . . we believe that the Tax Court's approach in this respect is sound; it is based on the desire for assuring a uniform result nationwide. As a national court, the Tax Court should not be required to decide identical cases differently because taxpayers happen to live in different circuits.[52]

The subsequent adoption of the proposal by the Congress and the reasons advanced during the hearings in support of it undercut the Cohen position. There is no longer a basis in the words of Congress for inferring that the Tax Court has a congressional mandate to promote the application of the tax policy of the executive branch. The Congress was unambiguous in the Tax Reform Act of 1969 in declaring the Tax Court's status as a court of record.[53]

B. *A Court of Tax Appeals*

A highly controversial proposal but one with the potential for considerable impact on the existing procedure for review of Tax Court decisions is the creation of a court of tax appeals. The creation of a single court of review would eliminate the technical justifications for use of the *Lawrence* doctrine, inasmuch as the Tax Court would no longer be faced with the problems inherent in its effort to deal with the precedents of eleven reviewing courts.

Proposals for the creation of a court of tax appeals are made periodically.[54] They invariably draw heavy criticism[55] and have yet to win broad support in the Congress. The most comprehensive outline of the structure and functioning of a court of tax appeals was provided some twenty-five years ago by Erwin Griswold, a former Dean of the Harvard Law School.[56] Griswold was concerned about the confusion and uncertainty that existed during the lengthy period of time it took to get a tax question before the Supreme Court.[57] The problem, he believed, was caused by the need to litigate a tax question many times before a conflict develops among the courts of appeals, thereby providing a basis for Supreme Court review on certiorari.[58]

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[52] *Id.* at 158.

[53] *Supra* n.44.

[54] Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944). Pope, *A Court of Tax Appeals: A Call for Re-examination*, 39 A.B.A.J. 275 (1953). Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFFALO L. REV. 5 (1962).

[55] For a general comment on the extent of the debate engendered by the Griswold proposal, see Tax Notes, 31 A.B.A.J. 376 (1945). For more detailed criticism of the concept of a court of tax appeals, see Miller, *The Courts of Last Resort in Tax Cases: A Specialized Court of Tax Appeals?*, 40 A.B.A.J. 563 (1954), and Miller, *Can Tax Appeals be Centralized?*, 23 TAXES 303 (1945).

[56] Griswold, *supra* n.54, at 1153.

[57] *Id.* at 1154-55, 1162.

[58] *Id.* at 1154-55.

Griswold would give a court of tax appeals exclusive appellate jurisdiction over civil tax cases.[59] The principal basis for Supreme Court review would be the existence of a constitutional question. On issues of statutory construction and application and on other questions of tax law, Griswold would have preferred that the decisions of a court of tax appeals be final. He believed that this finality would assure the timely settlement of most tax issues.[60] But recognizing that such a limitation would be too controversial, Griswold proposed instead to allow for Supreme Court review of all such questions on certiorari, trusting to the Supreme Court to limit its review to a very few cases.[61]

Critics of the Griswold proposal took issue with his basic premise by arguing that the major delays in the tax adjudication process occurred at the pre-appellate stage, not at the appellate level.[62] They also questioned the fairness and practicality of asking the Supreme Court to tighten up its criteria for reviewing tax cases, without doing the same in other areas of the law.[63] Moreover, the use of specialists in an appellate court met with disapproval, because it was thought that specialists would be insensitive to influences outside the tax area which require change in the handling of particular tax issues.[64] Concern was also expressed that a court appointed *en masse* would reflect political considerations to a much greater extent than a court whose members have been appointed over a period of many years.[65] These factors caused the House of Delegates of the American Bar Association to vote its disapproval of the Griswold proposal.[66]

There is nothing on record to suggest a significant abatement in this strong opposition to the creation of a court of tax appeals. Nonetheless, it is a proposal worthy of consideration from time to time, especially should the demands on the Tax Court and the courts of appeals shift sub-

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[59] *Id.* at 1164. The courts of appeals would retain appellate jurisdiction over criminal tax cases. *Id.*

[60] *Id.* at 1166-67.

[61] *Id.* at 1168.

[62] *Miller, Last Resort, supra* n.55, at 564. Miller, *Centralized, supra* n.55, at 303.

[63] Miller, *Last Resort, supra* n.55, at 565.

[64] *Id.* at 566. Griswold anticipated such criticism. He believed that the appointment process could prevent the selection of narrow, mechanical tax specialists. Moreover, if the court failed to recognize legitimate pressures for change, the Congress could be expected to legislate needed changes. Griswold, *supra* n.52, at 1183. It might also be argued that a court of tax appeals, comprised of tax specialists, would relieve the Supreme Court of the need to handle tax cases involving statutory interpretation, an area in which the Supreme Court has limited expertise. At the same time, the Supreme Court's broad concern for civil liberties would probably guarantee the correction of any oversights by a specialized court of tax appeals involving constitutional protections.

[65] Miller, *Last Resort, supra* n.55, at 567. Miller, *Centralized, supra* n. 55, at 306. One possible answer to this problem is suggested by the existence of precedent for appointment in such circumstances by the Chief Justice of the Supreme Court from the present judges of the district courts and the courts of appeal. Pope, *supra* n.54, at 277. This approach would also, initially at least, prevent domination of a court of tax appeals by specialists.

[66] 69 A.B.A. REP. 144 (1945).

stantially.[67] Until the Tax Court can look to a single court of appeals for precedent, technical justifications will continue to exist for use of the *Lawrence* approach. This fact is not sufficient in itself, however, to offset the many objections to the pronounced alteration in the existing structure for review of Tax Court decisions that would be caused by the creation of a court of tax appeals.

V. CONCLUSIONS

The Tax Court has made a wise decision in choosing to abandon the *Lawrence* approach to the extent that use of that doctrine put the court in the position of rejecting a court of appeals decision squarely in point when that court of appeals will review the case. In this most extreme form of the doctrine's application, the Tax Court only antagonized the reviewing court and involved the taxpayer in a costly and time-consuming delay to vindicate what were clearly his rights. Perhaps more importantly, use of the doctrine did little to further its announced objectives of promoting uniform application of the federal tax laws[68] and of speeding Supreme Court review of tax questions.[69] Even without using the *Lawrence* approach, the Tax Court retains adequate means of communicating its views —by giving its reasoning in cases appealable to courts whose views on the particular issue have not been expressed, and by explaining its agreement or disagreement with the precedent of a court of appeals which the Tax Court feels constrained to follow.[70]

The *Lawrence* doctrine may reappear from time to time in its less objectionable form, as a means of lifting the Tax Court out of a difficult situation of judicial administration. Its use may rescue the court from the illogical position of treating multiple taxpayers involved in the same transaction differently because the various litigants can appeal to two or more courts of appeals who have taken divergent positions on the issue in question. The *Lawrence* doctrine is not likely to re-emerge, however, as a device for promoting broad objectives of tax policy.

John J. Charles

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[67] The courts of appeals actually disposed of fewer civil tax cases in 1969 than they did ten years earlier. In 1969 the courts of appeals handled 349 cases; 190 of them were appealed from the Tax Court, 159 from district courts. 1969 ANN. REP. OF THE COMM'R OF INT. REV. 121, table 21. In 1959, 405 cases were disposed of, 284 from the Tax Court and 121 from the district courts. 1959 ANN. REP. OF THE COMM'R OF INT. REV. 130, table 21.

[68] Arthur T. Lawrence, 27 T.C. 713, 718 (1957).

[69] See the discussion of this point under heading III of this article.

[70] Jack E. Golsen, 54 T.C. 742,757 (1970).